No. 96-567

(5)

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,

Intervenors.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

The Commonwealth of Virginia ("Commonwealth") hereby files this reply brief in response to Respondents' Brief in Opposition ("EPA Br.") and the briefs filed by the Intervenors.

I.

EPA'S BRIEF DEMONSTRATES THAT § 502(b)(6) OF THE CAA IS AMBIGUOUS AND THAT CONGRESS HAS NOT INDICATED IN PLAIN TERMS A DESIRE TO REPLACE STATE STANDING LAWS IN THE MANNER EPA CLAIMS

If this Court harbors any doubts that the Commonwealth has correctly characterized § 502(b)(6) of the federal Clean Air Act ("CAA") as ambiguous, EPA's Brief should lay such concerns to rest. EPA's conflicting positions on this issue are interspersed throughout its Brief. On page 15, in an effort to fend off any application of the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), EPA claims that § 502(b)(6) already contains a "plain statement" which automatically renders the Commonwealth's standing laws inadequate for Title V program approval.

If that assertion were correct, no interpretation of the statute by EPA would have been needed. But elsewhere in its Brief, EPA concedes – as it must – that § 502(b)(6) "could be read to require States to dispense with standing requirements altogether." EPA Br. at 7. EPA then points out that it interpreted the statute by administratively adopting Article III standing requirements and then measured state programs, including the Commonwealth's, against its standard and not by any "plain statement" set out by Congress.

Such inconsistent arguments readily expose the ambiguity inherent in the statute, as well as the extraordinary efforts of EPA to support the Court of Appeals' unwillingness to apply *Gregory* as this Court intended. A

correct application of that decision would have required EPA to adopt an interpretation of the statute which would not intrude into a core element of state sovereignty – in this case, the jurisdiction of Virginia courts and the Commonwealth's right to decide for itself whether and to what extent to waive its immunity from suit in its own courts.[1]

II.

EPA MISCONSTRUES VIRGINIA'S CONSTRUCTION OF § 502(b)(6)

EPA could have avoided a constitutional confrontation by accepting the Commonwealth's reasonable construction of § 502(b)(6) (Petition, App. at 77).[2] That construction gives meaning to all three elements of the judicial review provision of § 502(b)(6), recognizing that each focuses on a different type of person: the applicant, a participant in the comment process, and a nonparticipant. EPA misunderstands this important distinction (EPA Br. at 8-9, 15 n.11), as did the Court of Appeals.[3]

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[1] Judge Luttig of the Court of Appeals, one of the five judges who voted to grant rehearing of this case (Petition, App. at 34), has articulated the appropriate application of the "plain meaning" rule in his dissent in *Virginia Dep't of Educ. v. Riley*, 86 F.3d 1337, 1353 (4th Cir.), *reh'g granted* (Oct. 11, 1996).

[2] EPA claims that its interpretation "accommodates" concerns of state sovereignty by permitting States to deny judicial review to participants not meeting (EPA's) Article III standard. EPA Br. at 17. Yet even EPA's interpretation intrudes into state sovereignty. Thus, EPA ignores the question whether Congress intended to do so.

[3] Contrary to EPA's claim, Virginia has never read the words "under applicable law" in the third phrase of § 502(b)(6) to modify the first two phrases, which would be grammatically incorrect. All parties must agree, however, that the entire § 502(b)(6) concerns only laws that are applicable in the States, which can only mean state standing laws.

The legislative history of § 502(b)(6) shows that Congress constructed the statute as it did because it wanted to ensure that Title V did not unintentionally eliminate existing avenues of judicial review. Its intent was not to establish three mutually exclusive categories of persons with different standing rights.[4] Initially, the House Amendment to § 502(b)(6) included language only to provide an opportunity for judicial review to applicants and to persons who participated in the comment process. 136 Cong. Rec. S16,941. Later, the Conference Agreement added the third category, explaining that it did so "to ensure that existing provisions of law governing the availability of such review are in no way limited by this title [Title V]."

Likewise, the Commonwealth's construction of § 502(b)(6) recognizes that all three categories overlap in their coverage. Certainly, the applicant is a person who

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[4] Congress had three concerns: (1) that appeals be had in state courts under state laws; (2) that Title V not limit avenues of appeal already provided by state law; and (3) that some degree of injury be required to appeal. Chafee-Baucus Statement of Senate Managers, S. 1630, THE CLEAN AIR AMENDMENTS OF 1990, reprinted in 136 Cong. Rec. S16,941 (daily ed. Oct. 27, 1990). The Statement (*id.* (emphasis added)) indicates § 502(b)(6) was intended to:

> make clear that judicial review of final actions by the permitting authority to issue or deny permits shall be *available in State court to anyone who could obtain such review under any applicable law.* This provision ensures that existing provisions of law governing the availability of review of final actions on permit applications are in no way limited, and that interested parties *who arguably are affected by permit decisions* are guaranteed their day in court.

also could obtain judicial review of that action as a participant in the comment process (second category) and under applicable law (third category). That fact does not make nullities of the first and second categories. Similarly, the second category does not become a nullity because the person identified there, under the Commonwealth's construction, is a "person who could obtain judicial review of that action under applicable law." The judicial review provision was simply written as it is in order not to preclude existing avenues of appeal.[5]

III.

EPA UNDERSTATES THE COERCIVE NATURE OF THE SANCTIONS AND OTHER MEASURES EMPLOYED IN THE CHALLENGED STATUTORY SCHEME TO UNCONSTITUTIONALLY FORCE COMPLIANCE BY THE STATES

In its Brief, EPA gives the mistaken impression that the penalty provisions of the challenged CAA scheme are of slight consequence.[6] It does so by ignoring certain

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[5] EPA and Intervenors join the Court of Appeals (Petition, App. at 21-22) in supporting their own incorrect interpretations of Virginia's standing statute (Va. Code § 10.1-1318(B)) by citing old and inapposite cases. EPA Br. at 10 n.8; EDF Br. at 4 n.4 & 5 n.5; Int. Br. at 5 n.5. For example, *Citizens for Clean Air v. Commonwealth*, 412 S.E.2d 715 (Va. App. 1991) was decided under the predecessor of § 10.1-1318(B). As the Commonwealth pointed out below, that statute was amended extensively in 1993 in an effort to accommodate § 502(b)(6). *Fries v. Virginia State Water Control Bd.*, 409 S.E. 2d 634 (Va. App. 1991) and *EDF v. State Water Control Bd.*, 404 S.E.2d 728 (Va. App. 1991) were decided under a different substantive law, the Virginia Water Control Act, which contained a judicial review provision similar to the earlier version of § 10.1-1318(B) and thus unlike the one at issue here.

[6] EPA does so, for example, by calling the CAA sanctions "so-called 'sanctions'." However, it was Congress, not Virginia,

salient factors that are crucial to the Tenth Amendment and Spending Clause analyses, and by incorrectly analyzing the sanctions separately and not cumulatively.

A.

In addressing the constitutionality of the highway funding and approval sanctions under the Tenth Amendment, EPA ignores the "federal approval" component which punishes noncomplying States by denying them needed federal approvals – *not just funds* – for highway construction projects, even those solely state financed. CAA § 179(b)(1) (42 U.S.C. § 7509(b)(1)) (Petition, App. at 74-75). Thus, not only would the Commonwealth lose federal highway construction funds, it would be precluded from undertaking significant state projects that require federal approvals. Petition at 4-5.

EPA also inappropriately makes light of the absolute block on federal funds for building roads in nonattainment areas. EPA Br. at 5, 23. If sanctioned, the Commonwealth could not, as EPA suggests, receive *all* of the federal funds earmarked for Virginia simply by taking on exempt projects or by shifting funds for use in other areas of Virginia. First, the endangered federal highway funds are designated for road-building projects – projects planned years in advance and approved by the federal government for those purposes alone. Restructuring Virginia's highway construction program to include only exempt projects would require additional years of planning and approvals.

Second, even if possible, restructuring would be impractical because it would not address the Commonwealth's needs. Virginia plans for and the federal government approves the Commonwealth's projects because they are essential to meeting the ever increasing demand on Virginia's highway system. Shifting funds to pay for

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that labeled these penalties "sanctions." 42 U.S.C. § 7509 (Petition, App. at 74-75).

buses, to build commuter parking lots, or to build roads in less travelled areas outside nonattainment areas would not address Virginia's highway needs. For these reasons, EPA's characterization of the sanctions' impact is inconsistent with the realities of transportation planning and funding.

In addition, EPA has misconstrued Virginia's argument regarding the economic impact of the highway sanctions. EPA Br. at 27. Unlike *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), the impact from the sanctions would be felt by the States as States: the States directly suffer an economic impact from the loss of millions of federal dollars. *Hodel* is neither relevant nor controlling here because it involved a claim of an *indirect* economic impact on a State from a direct impact on private entities within that State.

In response to the Commonwealth's assertion that the CAA's civil and criminal enforcement authority in § 113 is an important component of the Act's coercive scheme, EPA addresses §§ 113(a)(3) and (b) for the first time. EPA Br. at 21 & n.15. Citing two decisions holding that the CAA did not provide EPA with authority directly to compel States to adopt certain CAA programs, EPA claims that State implementation and/or enforcement of a federal Title V permit program is not an "enforceable 'requirement' under Section 113." But those cases – neither of which were decided on constitutional grounds – were later vacated by the Supreme Court, in light of EPA's unwillingness to argue that it indeed had that authority. *EPA v. Brown*, 431 U.S. 99 (1977). But, at EPA's urging, Congress subsequently amended the Act in 1977 expressly to ensure that EPA could use § 113 to require States to implement federal programs. See Petitioners' Reply Brief filed below, at 10-11.

Elsewhere EPA quotes from *Pennsylvania v. EPA*, 500 F.2d 246, 261 (3d Cir. 1974), to the effect that States "can be required [by EPA] to take affirmative actions" to address air pollution within their borders. EPA Br. at 24 n.17. The dispute in that case was whether EPA could

constitutionally apply § 113 enforcement mechanisms to the State. After first reviewing the legislative history and concluding that "Congress clearly contemplated that states could be required to implement a transportation control plan" (*id.* at 259), the Third Circuit held that the Commerce Clause (and, implicitly, the Tenth Amendment) did not prohibit EPA's use of § 113 to "require the Commonwealth to enforce [EPA's] transportation control plan." *Id.* at 257. The 1977 amendments simply codify the Third Circuit's holding and overrule the two cases cited by EPA.

Thus, EPA's assurances regarding the use of § 113 to coerce States into enforcing a federal regulatory program ring hollow.

B.

In opposing the Commonwealth's Spending Clause argument, EPA – like the Court of Appeals below – places mistaken emphasis on a line of Spending Clause decisions standing for the unremarkable and uncontested proposition that Congress may condition the receipt of federal grant funds on the recipient's compliance with federal directives. EPA Br. at 22-26 & n.16 (citing, *e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).[7] Instead, the relevant cases here concern Congressional attempts to deny federal funding to States unless they legislate, implement, and enforce certain other public policy objectives. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (enacting mandatory drinking age requirement as a condition on federal highway funds). In such cases, the Court has expressed two primary concerns, both of which are implicated here: First, there must be some reasonable relationship between the condition imposed and the purpose of the federal monies; and second, the result of noncompliance cannot be so draconian as to leave States without any real choice.

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[7] Virginia has challenged none of the CAA grant programs.

The issue here is whether the condition imposed by the CAA – that States implement a Title V program for *stationary* sources of air pollution – is reasonably related to the purpose of highway construction.[8] As the Commonwealth explained in its Petition at 27-30, there is no reasonable relationship. Furthermore, the effect of highway construction on air quality is of no consequence to this analysis. The Commonwealth has already explained, in the Petition and in section III.A above, why its attempt to minimize the coerciveness of the highway funding sanction ultimately fails. And EPA never addresses how the denial of such funds – even if reasonably related to achieving Title V's goals – is reasonably related to a State's adoption of a Title V permit program once a federal program is imposed in that State (which presumably would satisfy Congress' lawful objectives).[9]

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[8] EPA also misses the point in footnote 19 (EPA Br. at 25-26) regarding the federal government's approval of state highway construction projects. In deciding to fund state highway construction projects, the federal government approves projects only if it determines that they conform to federally approved state air pollution control plans (called State Implementation Plans (SIPs)), *i.e.*, that they will not increase pollution beyond that allowed in the SIPs. Thus, there is no need to withhold federal funding to control air pollution because the conformity process already deals with that issue. This is especially true given that Title V operating permit programs are not SIPs and they are not designed to impose additional limitations on emissions (Petition at 28 n.15).

[9] EPA attempts to address this argument in the context of the Tenth Amendment claim, but ends up simply agreeing with the Commonwealth's assertion that the only remaining purpose for the continuation of these sanctions is to force the States to take over for EPA by adopting their own State program. To the extent EPA argues that continuation of sanctions is necessary to ensure State "cooperation" in implementing a federal program, they ignore the essential point that, under the statutory scheme, no amount of cooperation – except for adoption of a State plan – would end the imposition of sanctions on that State.

Thus, this Petition raises a novel issue not addressed by *Dole* or, as far as can be determined, any subsequent cases. In *Dole*, Congress used its authority under the Spending Clause to implement a public policy it did not have the authority to implement directly. But here, there is no doubt Congress could impose a federal permit program identical to a state Title V program. This Court must now decide whether Congress can use its Spending Clause power to coerce States into regulating on its behalf. *Dole*, in light of *New York v. United States*, 505 U.S. 144 (1992), must be read to proscribe these coercive sanctions.[10]

IV.

CONCLUSION

This case presents a question of critical national importance: whether Congress, frustrated by the nature and pace of air quality improvements, can force the States to implement a burdensome federal program under pain of severe and disproportional sanctions that remain in place until the States comply. The severity of the sanctions and other enforcement measures makes it indisputable that Congress designed the challenged statutory scheme to ensure that States, not EPA, run the federal

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[10] EPA also misconstrues the Commonwealth's argument regarding the offset sanction. At page 27 of its Brief, EPA incorrectly analyzes the offset sanction under *Dole* and the Spending Clause. As the Commonwealth explained, the offset sanction violates the Tenth Amendment (not the Spending Clause) because, in concert with the other components of the challenged statutory scheme, its overriding and unlawful purpose is to coerce States into compliance, thus magnifying the pressure on those States. Petition at 21. Furthermore, EPA ignores the critical fact that it is the Commonwealth – not EPA – who must impose the offset sanction on regulated entities seeking construction permits. Petition at 5 n.2.

program. The sanctions go beyond inducement, and punish States rather than improve air quality. This Court must decide whether Congress can simply avoid the cost and inconvenience of establishing another federal program by forcing States to become mere instrumentalities of the federal government.

Respectfully submitted,

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